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No. 06-1005

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EFRAIN SANTOS AND BENEDICTO DIAZ,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BENEDICTO DIAZ

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BRIEF IN OPPOSITION FOR RESPONDENT BENEDICTO DIAZ

Respondent Benedicto Diaz respectfully requests that the Court deny the petition for a writ of certiorari.

This Court has been presented with the same question on three other occasions since 2002. On all three occasions, the Court has declined review. Every substantive argument now made by the government has been presented before. To this day, however, the government's predictions that the Seventh Circuit's interpretation of the money laundering statute will create "recurring" and "serious" enforcement problems remain unsubstantiated. As for the asserted conflict with other circuits, this Court has declined review even when the same conflict was presented previously. Moreover, the government has failed to show that the statutory interpretation it advocates would lead to a different result on the particular facts of this case.

In short, the question presented is no more suitable for review now than it was on prior occasions, and this case is not an appropriate vehicle for addressing it. The petition therefore should be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 461 F.3d 886. The opinion of the district court granting in part Diaz's motion for collateral relief (Pet. App. 51a-79a) is unreported. The opinion of the district court granting in part respondent Efrain Santos's motion for collateral relief (Pet. App. 17a-50a) is reported at 342 F. Supp. 2d 781.

STATEMENT OF THE CASE

Benedicto Diaz was charged in the Northern District of Indiana with "promotion money laundering" under 18 U.S.C. § 1956(a)(1), the federal money laundering statute, and

certain other offenses.[1] (Pet. App. 54a.) The charges arose from Diaz's participation in an illegal lottery known as a "bolita." (Pet. App. 52a.) The bolita employed "runners" who accepted bets, usually at bars and restaurants. (Pet. App. 52a.) Runners took a 15-25% commission from the bet money, then delivered the betting slips and remaining money to the bolita's "collectors." (Pet. App. 52a.) Diaz was a collector. He took a portion of the money for himself as "salary" (and occasionally paid off bettors who had won $100 or less), then delivered the remaining money and the betting slips to the bolita's operator, Efrain Santos. (Pet. App. 52a-53a.)

Pursuant to a guilty plea, Diaz was convicted of conspiracy to commit money laundering under 18 U.S.C. §

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[1] 18 U.S.C. § 1956(a)(1) provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity . . . ; or
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

Typically the two subsections are referred to as "promotion laundering" (subsection (a)(1)(A)(i)) and "concealment laundering" (subsection (a)(1)(B)(i)).

1956(h).[2] (Pet. App. 54a-55a.) His conviction was based solely on the fact that "he received payment for his 'collecting' services by taking money directly out of the total collected bets" before delivering the remaining bet money to Santos. (Pet. App. 54a-55a & n.5.) He was sentenced to a prison term of 108 months and fined $5,000. (Pet. App. 56a.)

Unlike Diaz, Santos went to trial. He was convicted of money laundering, conspiracy to commit money laundering, conducting an illegal gambling business, and conspiracy to conduct an illegal gambling business. (Pet. App. 18a, 20a.) He was sentenced to concurrent prison terms of 210 months for the money laundering convictions and 60 months for the illegal gambling convictions. (Pet. App. 20a.)

Diaz and Santos appealed their convictions, on different grounds. Diaz's appeal was limited to challenging the district court's rejection of his request to withdraw his guilty plea. (Diaz made that request on the ground that the government had breached his plea agreement by failing to seek a reduced sentence in exchange for his assistance.) (Pet. App. 55a-56a.) The convictions of both Diaz and Santos were affirmed in *United States* v. *Febus*, 218 F.3d 784 (7th Cir.), cert. denied, 531 U.S. 1021 (2000).

Approximately two years later, in *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S. 1071 (2002), the Seventh Circuit held that the money laundering statute was inapplicable to conduct that was virtually identical to the conduct underlying Diaz's and Santos's money laundering convictions. The court held that the word "proceeds" in the statute was properly interpreted as net profits rather than gross receipts. 282 F.3d at 478.

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[2] 18 U.S.C. § 1956(h) provides: "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

The unanimous opinion in *Scialabba*, written by Judge Easterbrook, supported its interpretation on several grounds. First, the court observed that the broader "gross receipts" interpretation conflicts with "the normal understanding of money laundering" by extending the money laundering statute to cover the payment of day-to-day expenses integral to the predicate offense. Under that extension of the statute, "the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475.

Second, the court pointed out that the "gross receipts" interpretation would lead to "odd outcomes" by dictating radically different results in functionally identical cases. *Id.* at 477. For example, the government conceded that under its interpretation, no "proceeds" would arise when an illegal slot machine or other gambling mechanism made payouts on winning bets automatically, whereas "proceeds" *would* arise when gamblers collected their winnings from the machine's operator via "separate transactions." Even though the economic results were the same, the operator in the former case would be subject to conviction for illegal gambling only, but in the latter case would be subject to conviction—and much harsher punishment—for money laundering as well. *Id.*

Third, the court noted that if a "gross receipts" interpretation were applied, "we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another." *Id.* "By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise." *Id.*

Finally, the court held, the "rule of lenity" requires that any ambiguity in the statute be resolved by applying the

narrower interpretation of the word "proceeds." Because Congress could easily have used the word "receipts" instead of "proceeds," the rule of lenity "counsels against transmuting the latter into the former and catching people by surprise in the process." *Id.*

Citing *Scialabba*, Diaz and Santos pursued collateral relief under 28 U.S.C. § 2255. The district court granted relief to both and vacated their money laundering convictions in parallel rulings. (Pet. App. 17a-86a.) On appeal from those rulings, the government's sole argument was that *Scialabba* was wrongly decided and should be overturned. (Pet. App. 4a.) The Seventh Circuit rejected the government's argument and affirmed the district court's rulings as to both Diaz and Santos. (Pet. App. 1a-16a.) The government's petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

This Court has already declined review of the question presented in three separate cases over the last four years, including *Scialabba* itself. All of the government's current arguments for a "gross profits" interpretation were also made in its *Scialabba* petition. Four years later, the government's reiterated predictions that *Scialabba* will create "recurring" and "serious" enforcement problems remain unsubstantiated. The government still has failed to provide a single concrete example of an investigation stymied by *Scialabba*. Furthermore, the mere fact that two other circuits have now expressly disagreed with *Scialabba* does not shift the balance in favor of review. This Court declined review of the question in those cases as well. In any event, the government has failed to show that the approach it advocates would lead to a different result on the facts of this particular case.

Contrary to the government's contentions, *Scialabba* does not require the development of special "accounting theories" for criminal enterprises. The government offers no reason to think that a bolita, for example, differs significantly from

legitimate lotteries or other cash-based businesses with respect to determining income, profits, and losses. In addition, the government's hypothetical assertions about insufficient documentation are belied by the undisputed facts of this case, in which the government recovered a trove of financial records—including records of the bolita's *accountant*. Money laundering is a quintessentially financial crime and typically involves transactional evidence of some kind. Indeed, the government does not dispute that it can and does quantify the profits of illegal enterprises under other statutes. Finally, the government's citation of cases in which transactions involving "expenses" or "reinvestments" were successfully prosecuted in no way demonstrates that *Scialabba*'s standard was unattainable in those cases, and the government's suggestion that "concealment" cases will be more difficult to prove is likewise unsupported.

Finally, the government fails to rebut two basic justifications cited by *Scialabba* for the "net profits" interpretation. First, *Scialabba* invoked the rule of lenity, a settled rule of statutory construction, under which any ambiguity in the statute must be resolved in favor of the narrower interpretation. The government's petition does not even mention the rule. Second, *Scialabba* pointed out the necessity of avoiding a merger of money laundering with the predicate offense (e.g., illegal gambling). The government concedes that necessity. Moreover, it does not dispute that *Scialabba*'s "net profits" interpretation successfully avoids the merger problem. The government merely asserts that the problem should be addressed differently—by applying a "gross profits" interpretation while requiring that any alleged laundering transaction occur subsequent to the predicate offense. As the government's own hypotheticals suggest, however, this timing standard is indeterminate and leads to inconsistent results. Accordingly, the petition should be denied.

A. The Government's Criticisms Of *Scialabba* Are No More Persuasive Now Than When Review Was Sought And Denied In *Scialabba*.

In criticizing *Scialabba*'s reasoning and its supposed effects, the government has simply restated, essentially verbatim, the arguments and predictions made in its *Scialabba* petition. This Court denied the *Scialabba* petition in 2002 (not 2004, as the government states (Pet. 27).) The intervening years have not improved the government's assertions.

1. The government's principal argument is that *Scialabba* will create "recurring" and "serious practical problems" that will hinder money laundering prosecutions. (Pet. 15, 26.) The government made the same prediction in its *Scialabba* petition. (*Scialabba* Pet. 21-23.) Nevertheless, the government still has failed to cite a single example of a prosecution that has actually been hindered. Its assertions remain entirely speculative and hypothetical.

The government contends that *Scialabba* creates two types of "practical problems": (a) in some cases, the government may find it difficult to prove net profits because special "accounting principles" for criminal enterprises have not been developed and records may be inadequate (Pet. 11, 15-17); and (b) *Scialabba* "forecloses prosecution of expense cases as a legal matter and sever[e]ly limits prosecution of reinvestment cases as a practical matter," and "will also likely impede prosecutions under the concealment subsection of the money laundering statute" (Pet. 19). None of these contentions, however, is supported by concrete evidence.

"*Accounting theory*" *and* "*record keeping.*" The government argues that "there are no generally accepted accounting principles for criminal enterprises," and that a "net profits" interpretation will "require the courts to formulate an accounting theory for illegal businesses." (Pet. 15.) This is both speculative and counter-intuitive. Determining net

profits by subtracting expenses from gross receipts follows the same basic "accounting principles" whether a business is lawful or unlawful. Courts understand the concepts of gross receipts and net profits, and routinely apply them in a wide variety of contexts. Novel "accounting theories" or Wharton School PhD's are unnecessary.

Equally unpersuasive is the government's assertion that "record keeping" will be inadequate. Gambling and other businesses in which money laundering is endemic typically generate records and other transactional evidence sufficient to support whatever basic calculations are necessary. This case vividly illustrates the point. The government recovered a trove of "ledgers," "betting sheets, betting slips, cash, and other evidence of [defendants'] illegal Bolita." (Pet. App. 19a, 20a.) Indeed, as conceded in its briefing below, the government even recovered financial records from the bolita's *accountant*.

It should also be noted that, since at least 1991, the Seventh Circuit has applied its "net profits" interpretation to RICO's criminal forfeiture statute.[3] See *United States* v. *Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 500 U.S. 919, 502 U.S. 823 (1991). The government does not suggest that consequent "accounting theory" and "record keeping" problems have prevented it from enforcing the RICO forfeiture provision effectively. See also *United States* v. *Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998) (calculation of net profits required under sentencing guidelines).

"Expense," "reinvestment," and "concealment" cases. The government argues that *Scialabba* will impede the prosecution of "promotion laundering" cases that involve

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[3] That statute, 18 U.S.C. § 1963(a)(3), provides for forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."

"expenses" or "reinvestment," and may impede the prosecution of "concealment laundering" cases as well. (Pet. 17-19.) Those arguments, too, are unsupported.

The government cites numerous cases in which activity involving "expenses" or "reinvestment" appears to have been successfully prosecuted (Pet. 17 n.3, 18 n.4), but it never takes the necessary further step of showing that such cases would have failed under *Scialabba*. Simply because a prosecution was successful under one standard ("gross receipts") does not mean that evidence was unavailable to support a prosecution under another standard ("net profits").

Of course, a hypothetical case in which no proof exists for anything other than "expense" transactions would be excluded under *Scialabba*, but that is simply another way of saying that net profits are required under *Scialabba*. It does not follow that significant numbers of actual cases will fall into this supposed "pure expense" category, and common sense suggests that substantial criminal enterprises usually will involve more than just expense payments. As for "reinvestment," *Scialabba* is fully consistent with that concept. Reinvestment typically involves plowing *profits* back into a business to strengthen and expand it, not just paying day-to-day expenses.[4]

Finally, the government declares that *Scialabba* may make it more difficult to prosecute not only "promotion laundering" but also "concealment laundering." (Pet. 19.) This assertion remains unsubstantiated as well. The government fails to identify even a single "concealment" case

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[4] See, e.g., *United States* v. *Wilson*, 244 F.3d 1208, 1211 (10th Cir. 2001) (like other "successful entrepreneurs," drug traffickers "reinvested early profits" to expand their unlawful business); *Estate of Wallace* v. *Comm'r*, 965 F.2d 1038, 1040 (11th Cir. 1992) (lawful cattle-feeding business grew by "reinvesting profits in more cattle").

that would have succeeded but for *Scialabba*. In any event, the "net profits" interpretation is just as appropriate in the "concealment" context as it is in the "promotion" context. "Concealment" laundering involves extracting money from an unlawful business and investing it elsewhere to disguise its tainted origins. Money extracted from a business and invested elsewhere typically consists of net profits, not gross receipts, whether the business is lawful or unlawful. In contrast, payment of an illegal enterprise's ongoing expenses normally does nothing to conceal the illicit nature of the money employed. As the Seventh Circuit has explained in addressing "concealment" laundering, "the mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute"; "it is important, even if difficult at times, to ensure that the money laundering statute not turn into a 'money spending statute.'" *United States* v. *Esterman*, 324 F.3d 565, 570, 573 (7th Cir. 2003).

In sum, although difficulties of proof may arise in individual cases under the "net profits" standard (just as they do under a host of other legal standards), the government has failed to make the slightest showing that any supposed difficulties are endemic and insurmountable.

2. The government also criticizes *Scialabba*'s "net profits" interpretation by citing a few dictionary definitions and the interpretation of "proceeds" under some other statutes. (Pet. 12.) The government made exactly the same arguments in its *Scialabba* petition. (*Scialabba* Pet. 8-9.) Once again, the government's arguments are no more persuasive now than they were before.

Selected dictionary definitions. In support of a "gross profits" interpretation, the government cites selected definitions of the word "proceeds" in Random House, Black's, and Webster's dictionaries. As the government acknowledges, however, other definitions in the same dictionaries support a "net profits" interpretation. (Pet. 12-

13.) See, e.g., *Random House Dictionary of the English Language* 1146-47 (2d ed. 1987) (defining "proceeds" as "the *profits* or returns from a sale, investment, etc.") (emphasis added); *Webster's Third New International Dictionary* 1807 (1993) (defining "proceeds" as "the *net sum* received (as for a check, a negotiable note, an insurance policy) after deduction of any discount or charges") (emphasis added).

Thus, the government's dictionary definitions are inconclusive at best. Indeed, the Third Circuit in *United States* v. *Grasso*, 381 F.3d 160 (3d Cir. 2004), vacated on other grounds, 544 U.S. 945 (2005)—one of the post-*Scialabba* decisions on which the government relies—rejected dictionary definitions as "neither uniform nor dispositive." 381 F.3d at 167.

Other statutes. Also inconclusive are the government's references to some other statutes that use the word "proceeds"—in particular, RICO's criminal forfeiture provision. (Pet. 13-14.) The government cites three decisions that interpret the word "proceeds" there as meaning "gross receipts." (Pet. 13.)[5] As already noted, however, the Seventh Circuit has consistently adhered to a "net profits" interpretation in the RICO forfeiture context as well. The Seventh Circuit made its position clear in a 1991 decision that this Court declined to review. *United States* v. *Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), cert. denied, 500 U.S. 919, 502 U.S. 823 (1991). The government fails to identify any enforcement problems created by the Seventh Circuit's interpretation over the last 15 years.

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[5] The government cites *United States* v. *Simmons*, 154 F.3d 765 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293 (D.C. Cir. 1997); and *United States* v. *Hurley*, 63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). See also *Scialabba* Pet. 16 n.3 (citing the same three cases).

Finally, the government cites a few other statutes in other contexts (Pet. 14 & n.2), but it notably omits any discussion of the statute that defines the predicate offense in this very case, illegal gambling. That statute, 18 U.S.C. § 1955(b)(1)(iii), refers to a business that "has a *gross revenue* of $2,000 in any single day" (emphasis added). Numerous other criminal statutes refer to "gross revenue" or "gross receipts" as well. E.g., 18 U.S.C. § 225(a)(2); 18 U.S.C. § 1511(b)(1)(iii) & (c); 18 U.S.C. § 1955(c) & (e); 18 U.S.C. § 3591(b)(1); 21 U.S.C. § 848(b)(2)(B); 21 U.S.C. § 856(d)(1)(B). Congress evidently knew how to use the term "gross revenue" or "gross receipts" but chose not to do so in the money laundering statute.

B. The Putative Circuit Conflict Is More Illusory Than Real.

Apart from reiterating its previous criticisms of *Scialabba*, the government argues that a circuit conflict has arisen because two post-*Scialabba* cases expressly disagree with the Seventh Circuit's position: *United States* v. *Iacaboni*, 363 F.3d 1 (1st Cir.), cert. denied, 543 U.S. 978 (2004); *United States* v. *Grasso*, 381 F.3d 160 (3d Cir. 2004), vacated on other grounds, 544 U.S. 945 (2005). (Pet. 22-23.) This is the government's one attempt to distinguish the present petition from its petition in *Scialabba*, but it, too, is unconvincing.

1. *Iacaboni* and *Grasso* both presented this Court with further occasions to consider the question presented. The Court declined the invitation in both cases. In *Iacaboni*, review was denied even though the defendant's petition asserted a circuit split between *Iacaboni* and *Scialabba* on the "gross receipts vs. net profits" question. (*Iacaboni* Pet. 7-9.) Similarly, in *Grasso*, the defendant's petition asserted a circuit split between *Grasso* and *Iacaboni* on one side and *Scialabba* on the other. (*Grasso* Pet. 7-9.) Once again, this Court declined to consider the issue but granted the petition and vacated *Grasso* in light of *United States* v. *Booker*, 543

U.S. 220 (2005). The Seventh Circuit's reaffirmation of *Scialabba* in the present case does nothing to alter these circumstances in favor of review.[6]

In any event, the government fails to demonstrate how its interpretation of *Iacaboni* and *Grasso* would lead to a different result on the particular facts of this case. According to the government, even under a "gross receipts" interpretation, a money laundering transaction still "must follow and be separate from any transaction necessary for the predicate offense to generate proceeds." (Pet. 20, quoting *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998).) Here, however, the transactions in question were integral parts of the predicate offense, i.e., conducting an illegal gambling business. Diaz, for example, was convicted of nothing more than taking his "salary" from the money he collected before handing over the rest to Santos. Even under the government's approach, Diaz's conviction was invalid because the conduct in question did not "follow" and was not "separate from" the illegal activity that generated the supposed proceeds. Insofar as this Court reviews judgments, not opinions, it should await a proper vehicle for deciding the question presented.

2. In all other respects, the government's assertions of conflict cover exactly the same ground as its unsuccessful petition in *Scialabba*. For example, the government declares that *Scialabba* "cannot be squared with the results in numerous cases in which courts of appeals have found sufficient evidence to support money laundering convictions based on the use of receipts of illegal activity to pay accomplices or other costs incurred to conduct that activity." (Pet. 25.) The government describes those cases as involving

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[6] The government also cites *United States* v. *Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005) (Pet. 24), which follows *Grasso* in the forfeiture context but does not refer to *Scialabba*.

"overhead expenses"[7] and "reinvestment of illegally-derived funds."[8] The same assertions were made in the *Scialabba* petition, using virtually identical language. (*Scialabba* Pet. 13, 18-20.) The present petition merely adds a few newer cases that go no further than the old ones.[9] None of the cited

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[7] Pet. 17 & n.3, citing: *United States* v. *Alerre*, 430 F.3d 681 (4th Cir. 2005); *United States* v. *Caplinger*, 339 F.3d 226 (4th Cir. 2003); *United States* v. *Bolden*, 325 F.3d 471 (4th Cir. 2003); *United States* v. *Evans*, 272 F.3d 1069 (8th Cir. 2001); *United States* v. *Wyly*, 193 F.3d 289 (5th Cir. 1999); *United States* v. *Rudisill*, 187 F.3d 1260 (11th Cir. 1999); *United States* v. *Reed*, 167 F.3d 984 (6th Cir.), cert. denied, 528 U.S. 897 (1999); *United States* v. *King*, 169 F.3d 1035 (6th Cir.), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203 (4th Cir. 1998); *United States* v. *Hildebrand*, 152 F.3d 756 (8th Cir.), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Coscarelli*, 105 F.3d 984 (5th Cir. 1997); *United States* v. *Marbella*, 73 F.3d 1508 (9th Cir. 1996); *United States* v. *Skinner*, 946 F.2d 176 (2d Cir. 1991).

[8] Pet. 18 & n.4, citing: *United States* v. *Silvestri*, 409 F.3d 1311 (11th Cir.), cert. denied, 126 S.Ct. 772 (2005); *United States* v. *Williamson*, 339 F.3d 1295 (11th Cir. 2003); *United States* v. *Godwin*, 272 F.3d 659 (4th Cir. 2001); *United States* v. *Barragan*, 263 F.3d 919 (9th Cir. 2001); *United States* v. *Dovalina*, 262 F.3d 472 (5th Cir. 2001); *United States* v. *Stewart*, 256 F.3d 231 (4th Cir.), cert. denied, 534 U.S. 1049 (2001), 535 U.S. 977 (2002); *United States* v. *Burgos*, 254 F.3d 8 (1st Cir.), cert. denied, 534 U.S. 1010 (2001); *United States* v. *Meshack*, 225 F.3d 556 (5th Cir. 2000), cert. denied, 531 U.S. 1100 (2001); *United States* v. *Taylor*, 239 F.3d 994 (9th Cir. 2001); *United States* v. *Haun*, 90 F.3d 1096 (6th Cir. 1996); *United States* v. *Golb*, 69 F.3d 1417 (9th Cir. 1995); *United States* v. *Thomas*, 12 F.3d 1350 (5th Cir.), cert. denied, 511 U.S. 1095, 1114 (1994); *United States* v. *Cruz*, 993 F.2d 164 (8th Cir. 1993); *United States* v. *Cole*, 988 F.2d 681 (7th Cir. 1993); *United States* v. *Johnson*, 971 F.2d 562 (10th Cir. 1992); *United States* v. *Jackson*, 935 F.2d 832 (7th Cir. 1991).

[9] The added "overhead expense" cases are *Alerre*, *Caplinger*, and *Bolden*; the added "reinvestment" cases are *Silvestri* and *Williamson*.

cases refers to *Scialabba* (even though several post-date it); none of them addresses the "gross receipts vs. net profits" question; and none of them establishes that prosecution under the "net profits" standard would have been impossible in their respective circumstances.

C. The Government Has Failed To Rebut *Scialabba*'s Underlying Justifications.

Scialabba cites two underlying justifications for its "net profits" interpretation: (1) the rule of lenity, and (2) the need to avoid a merger of money laundering with the predicate offense. The government fails to rebut either justification.

Indeed, the government does not even *mention* the rule of lenity. Under this settled rule, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Bass*, 404 U.S. 336, 347 (1971); see also *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000).

In addition, *Scialabba* emphasizes the need to avoid a statutory interpretation that effectively merges money laundering with the predicate offense. Courts recognize that money laundering charges can be used improperly to ratchet up sentences beyond those available solely for the underlying crime. See, e.g., *United States* v. *Montague*, 29 F.3d 317, 318 (7th Cir. 1994) ("an aggressive United States Attorney can use the money laundering statute" to obtain "more draconian sentences" than the underlying crime entails); see also *United States* v. *Conley*, 37 F.3d 970, 979 (3d Cir. 1994) ("Congress did not enact money laundering statutes simply to add to the penalties for various crimes in which defendants make money").

The government concedes that avoiding a merger of money laundering with the predicate offense is a legitimate concern. Moreover, the government does not dispute that *Scialabba*'s "net profits" interpretation avoids such a merger. The government merely argues that *Scialabba* should have

solved the problem differently. As already noted, the government contends that the problem can be avoided by applying a "gross receipts" standard while "generally requiring that the charged financial transaction 'must follow and must be separate from any transaction necessary for the predicate offense to generate proceeds.'" (Pet. 20, quoting *Mankarious*, 151 F.3d at 706.)

The government's approach, however, fails to provide a consistent basis for avoiding the merger problem. For example, the government argues that there are no "proceeds" from a bank robbery "until the bank has been robbed"; thereafter, "a bank robber's use of the loot from a robbery to pay his accomplices can constitute money laundering, because the payment to the accomplices involves the proceeds generated by the robbery." (Pet. 20-21.) The government's before/after test, however, is legally and logically inadequate.

Suppose, for example, that the bank robber's accomplice serves as a lookout at the door, and instead of making a subsequent payment, the robber and lookout agree in advance that the lookout can take his payment from the nearest cashier while the robber takes the rest. Under the government's approach, the subsequent payment is money laundering but the contemporaneous payment is not—it is bank robbery, the predicate offense. The government's distinction makes no sense because the economic results are identical. (As noted above, an analogous situation was discussed in *Scialabba*, which contrasted an illegal slot machine that makes automatic payouts to winners with another machine that requires winners to collect their money separately. The government sought to distinguish the two, but, again, the economic results are identical. See *Scialabba*, 282 F.3d at 477.)

The bank robbery example crystallizes Diaz's situation here. Diaz was convicted of money laundering for the simple act of taking his "salary" from the money he had collected before delivering the rest to Santos. Suppose, instead, that he

first delivered all of the money to Santos and then a moment later received some of it back as his salary. Would that make a difference? Apparently it would, according to the government's before/after theory. But Diaz was convicted for taking his salary *before*, not after, delivery, and the government seeks to reinstate his conviction. The government's approach is inconsistent on the undisputed facts of this case. Moreover, the government's approach would ensnare the courts in metaphysical questions concerning which aspects of an ongoing business are temporally distinguishable from others. *Scialabba* avoids such metaphysical questions and looks instead at economic reality—whether the money constituted net profits. That question may involve occasional difficulties of proof (as do many other legal tests), but the question itself is simple and concrete.[10]

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[10] The government's cited authority, *Mankarious*, actually contradicts the government's theory that timing will consistently distinguish money laundering from the underlying crime. *Mankarious* states: "Because, as we have already explained, money laundering does not focus on the specifics of the predicate offense, *it does not matter when all the acts constituting the predicate offense take place*. It matters only that the predicate offense has produced proceeds in transactions distinct from those transactions allegedly constituting money laundering." 151 F.3d at 706 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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